

**DARLINGTON BOROUGH COUNCIL**

**PLANNING APPLICATIONS COMMITTEE**

**COMMITTEE DATE: 27 March 2013**

**Page**

---

<b>APPLICATION REF. NO:</b>	<b>12/00751/FUL</b>
<b>STATUTORY DECISION DATE:</b>	<b>20/02/13</b>
<b>WARD/PARISH:</b>	<b>Sadberge and Whessoe</b>
<b>LOCATION:</b>	<b>Moor House, Bishopton Lane, Great Burden.</b>
<b>DESCRIPTION:</b>	<b>Erection of six wind turbines and ancillary works without complying with condition 22 of planning permission 11/00160/FUL.</b>
<b>APPLICANT:</b>	<b>Banks Renewables Ltd.</b>

---

**APPLICATION AND SITE DESCRIPTION**

This application seeks to remove condition 22 of the original planning permission for six wind turbines which relates to Excess Amplitude Modulation (EAM). The applicants have confirmed that they continue to rely on the Environmental Statement that accompanied the original planning permission in support of granting permission for the development without condition 22.

Consideration of the application was deferred at a previous Committee meeting on 6 February 2013 to allow the applicant's proposed Environmental Management Plan to be publicised and considered. The document in question was previously circulated to Committee Members.

In terms of the overall application the principle of development remains acceptable and there have been no other changes to the application. It is therefore considered that the assessment made under application 11/00160/FUL remains valid and there have been no material changes that necessitate these issues being re-assessed. A screening opinion was previously issued to the applicant confirming that a further environmental assessment would not be required to accompany this planning application.

Therefore the only issue for consideration in this application is whether condition 22 meets the test of conditions set out in the National Planning Policy Framework and given the evidence submitted whether the condition is still seen as necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Whilst a number of authorities have previously included an EAM condition as a precautionary measure, an approach replicated in Darlington, there is now a considerable body of cases where Planning Inspectors have declined the use of such a condition on grounds that it would fail to meet the various tests for conditions set out in government advice. In this context, officers have sought

external legal and technical advice with respect to the validity of the condition which will be referred to later in the report.

It is important to emphasise that the proposal under consideration does not involve the removal of other conditions designed to control the general noise levels at various noise sensitive locations resulting from the operation of the turbines.

Condition 22 reads as follows:

*On the written request of the local planning authority, following a complaint to it considered by the local planning authority to relate to regular fluctuation in the turbine noise level (amplitude modulation), the wind farm operator shall at its expense employ an independent consultant approved in writing by the local planning authority to undertake the additional assessment outlined in Guidance Note 5 to ascertain whether amplitude modulation is a contributor to the noise complaint as defined in Guidance Note 5. If the said assessment confirms amplitude modulation to be a contributor as defined in Guidance Note 5, the local planning authority shall request that within 28 days of the completion of the noise recordings referred to in Guidance Note 5, the developer shall submit a scheme to mitigate such effect. Following the written approval of the scheme and the timescale for its implementation by the local planning authority the scheme shall be activated forthwith and thereafter retained.*

A description of what constitutes EAM is given below under the Planning Issues heading.

## **PLANNING HISTORY**

Planning application 08/00777/FUL was submitted in October 2008 for a wind monitoring mast and was approved in November 2008.

Planning application 09/00741/FUL was submitted by Moor House Wind Farm Ltd in November 2009. That scheme contained a total of ten turbines. Four of the turbines were planned to be 110 metres tall and six were planned to be 100 metres. The planning application was refused permission by the Planning Applications Committee on 10 November 2010 on visual amenity grounds.

Planning application 11/00160/FUL was submitted in early 2011 for six wind turbines and approved in October 2011 with numerous conditions imposed, one of which was condition 22 which relates to Excess Amplitude Modulation.

## **PLANNING POLICY BACKGROUND**

National Planning Policy Framework – Section 10, Meeting the challenge of climate change, flooding and coastal change.

### **Regional Guidance**

The Coalition Government has indicated its intention to abolish Regional Planning Policy in the form of Regional Spatial Strategies. At the time of writing the courts have ruled that the Government has not carried out the necessary changes in legislation for the RSS to cease to take force and at present the intent to abolish is not considered a material consideration. Even when RSS is abolished it is understood that the evidence base which was collected in producing the

RSS will still be capable of being material to planning decisions. This was confirmed in a letter from the Government's Chief Planner to all local authorities in July 2010. This is relevant to Moor House because the regional evidence base included two landscape capacity studies which relate to the Tees Plain and which were cited in the refusal reason of the original planning application.

The Regional Spatial Strategy for the North East was finalised in 2008 following an Examination in Public in 2006. As highlighted above the evidence base for the RSS policies included the North East Renewable Energy Strategy.

The Local Development Plan – the adopted Core Strategy Policy CS3 - Promoting renewable energy.

Local Wind Farm Development Guidance:

Landscape Appraisal for Onshore Wind Development (GONE 2003).

Landscape Capacity Study for the East Durham Limestone area and the Tees Plain (North East Assembly and ARUP 2008 plus addendum).

## **RESULTS OF CONSULTATION AND PUBLICITY**

There have been a number of objections submitted from local residents and others. They have taken the form of individual letters and E mails in addition to pro forma notes signed and addressed by local residents. The numbers of objections were as follows:

13 individual letters/ e-mails

Approximately 85 pro forma notes signed by some 145 individuals.

The main reason for objecting to the application is that residents did not want to see the condition removed as it is seen as a form of protection against noise nuisance that may be caused by Excess Amplitude Modulation.

Other issues raised include:

- The condition should be re drafted not removed
- The applicant's original noise report indicated that there is a "greater than average risk of AM at this site".
- Just because the cause of EAM is not fully understood, that should not mean the removal of condition 22 is acceptable.  
Noise problems cannot be pursued via the Statutory Nuisance route as it is expensive for the Council and presents difficult legal and technical challenges.
- The Environmental Management Plan (EMP) is not seen as an effective alternative.
- Concerns with respect to aviation safety
- No evidence that legal advice has been sought in relation to the removal of the condition.
- A further environmental impact assessment is required
- There is a greater than average risk of EAM at this site so a new EMP should be prepared if condition 22 is to be removed.
- Legal opinion supports the lawfulness of the condition.

- Legal opinion supports the notion that the condition complies with Circular 11/95.
- The Human Rights Act should be taken into account.
- If condition 22 is necessary but cannot be imposed permission for the development should be refused.
- Considers that the Statutory Nuisance option of controlling EAM not suitable.
- The EMP may be acceptable if worded properly

Consultee responses are as follows:

Sadberge Parish Council – Objects to the removal of the condition as it protects residents from noise nuisance caused by EAM. The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear which is associated with EAM.

In addition the Parish Council has responded to the revised Environmental Management Plan (EMP) in detail, which can be read in full on line, however in summary they maintain that it will not protect the public from EAM nuisance for the following reasons:

- The EMP is vague and cannot be properly enforced
- Timescales for implementing investigations are imprecise as is who will carry out the work
- In general the Parish Council does not trust the Applicants to carry out best practice in the interests of members of the public affected by EAM.

Bishopton Parish Council - Objects to the removal of the condition as it protects residents from noise nuisance caused by EAM. More evidence of the impacts of removing the condition need to be provided by the applicants. In addition it endorses the comments of Sadberge Parish Council in relation to the revised EMP, and considers that the content is vague and non specific.

East and West Newbiggin Parish Meeting - The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear which is associated with EAM hence residents believe the condition should remain as a form of protection. The EMP proposed by Banks fails to provide this protection. More evidence of the impacts of removing the condition need to be provided by the applicants.

Little Stainton Parish Meeting – Nothing has changed since condition 22 was imposed so no reason to remove it now. Other wind farms without this condition have suffered noise problems from turbines. The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear which is associated with EAM. More evidence of the impacts of removing the condition need to be provided by the applicants.

Barmpton Parish Meeting – No objections to the proposal.

Seven Parishes Action Group – Support all that the above objecting Parishes say. Concerned that Statutory Nuisance legislation would not be a quick remedy if EAM problems arose. The removal of the condition should not have a financial justification as this is not a material planning consideration. Considers that the revised EMP does not improve protection for local residents from EAM nor give robust timescales for the problems to be solved. Maintains that the condition should be retained.

Environment Agency – no objections

Highways Agency – re-iterate previous stance and raise no objection to current application

Natural England – no further comment

Council Environmental Health Officer –

*Since I commented previously regarding this application, the Council has received advice from Parsons Brinckerhoff(PB), which is an independent acoustic consultancy. Legal opinion has also been obtained. PB's advice is that it is not currently possible to construct a suitable condition for Excess Amplitude Modulation(EAM) that would meet the six tests of Circular 11/95. The legal opinion concurs with this view and also states that the Environmental Management Plan suffers from similar problems identified with respect to a possible planning condition.*

*Another option to control EAM should it occur is the statutory nuisance regime. However, PB have stated that the Defra report (produced by AECOM) notes, whilst it is theoretically possible to take nuisance action, it would be a significant "challenge" for a Local Authority to take this action due to the technical and legal challenges it would present. Therefore, it remains to be seen whether statutory nuisance action would be successful in resolving any EAM issue should it occur.*

CPRE – No evidence provided that the condition is not required. The application site is likely to suffer a greater than average risk from EAM nuisance as it experiences frequent periods of high wind shear. Concerned that Statutory Nuisance legislation would not be a quick remedy if EAM problems arose.

## **PLANNING ISSUES**

### **What is Excess Amplitude Modulation (EAM) to which condition 22 relates?**

Noise is a sensitive subject and is discussed in detail during the determination of planning applications for wind turbines. It has also been debated through the appeal process and there have been numerous appeal decisions which have discussed the issue of noise at great length.

Excess Amplitude Modulation (EAM) and the need for a condition to control it has been one of the topics heavily debated through the appeal process. EAM is commonly referred to as blade swish. It would involve the control of noise that might occur over and above the normal level of blade swish noise. The appeal decision in relation to the Langford Wind Farm which was allowed states '*Amplitude Modulation (AM) or "blade swish" is an aspect of the aerodynamic noise from wind turbines that can be particularly noticeable or insistent but which is still not fully understood*'.

The companion guide to the former PPS22 states in paragraph 42 '*there are two quite distinct types of noise source within a wind turbine. The mechanical noise produced by the gearbox, generator and other parts of the drive train; and the aerodynamic noise produced by the passage of the blades through the air*'. The paragraph concludes by saying '*Aerodynamic noise from wind turbines is generally unobtrusive - it is broad-band in nature and in this respect is similar to, for example, the noise of wind in trees*'.

It is common knowledge that there have been instances at some wind farms of reported noise characteristics which could not be attributed to normal blade swish. The Government

commissioned a study in to the phenomenon which was undertaken by the University of Salford, the findings were published in 2007. The research suggested a relatively low incidence of occurrences (evident in 4 and possibly another 8 sites out of a total of 133), however, these findings were based on descriptions of noise characteristics and later re-interpretation of the data suggested that the incidence might be as high as 25%.

Whilst several potential causes have been identified, despite the research undertaken by Salford University, there remains no consensus as to the trigger for excess amplitude modulation. The Appeal Decision in relation to land at Cotton Farm, St Neots which was allowed states that:

*“Based on the findings of low incidence and the number of people affected being small, the Government's view is that there is not a compelling case for more work on AM and that the minimisation of increases in noise through the use of ETSU-R-97 remains appropriate”.*

Various factors are considered to be possible causes of EAM, these include - squat turbine designs, linear turbine arrangements, turbines too closely spaced together, high levels of wind shear, reflective surfaces close to the receiver, topography, distance from dwellings, wind direction and background noise levels. It can be seen from the information above that there is little agreement over the causes of excess amplitude modulation and given the University of Salford's research it is considered that the incidence of it occurring is relatively low, although after re-interpretation this increased to potentially 25% of the 133 sites that were examined.

### **The tests of a condition as set out in the National Planning Policy Framework and Circular 11/95**

The National Planning Policy Framework states in paragraph 206 that planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. This guidance reflects the advice set out in Circular 11/95.

Circular 11/95 sets out that there are six tests for conditions. As a matter of policy the Circular states that conditions should only be imposed where they satisfy all of the tests. The tests are discussed in detail within paragraphs 14-42 of the Circular. and explain that conditions should be:

- i) necessary - the guidance is that Local Planning Authorities in considering whether a particular condition is necessary, should ask themselves whether planning permission would have to be refused if that condition were not to be imposed.
- ii) relevant to planning - the guidance is that conditions should be relevant to planning, any condition which has no relevance to planning is ultra vires. Guidance also states in paragraph 22 that other matters are subject to control under separate legislation and a condition which duplicates the effect of other controls will normally be unnecessary.
- iii) relevant to the development permitted - a condition must fairly and reasonably relate to the development permitted. If it is not considered to relate to the development permitted it is considered ultra vires.
- iv) enforceable - the guidance states that a condition should not be imposed if it cannot be enforced. There are two aspects of this, the practicality of enforcement and whether compliance is reasonable. In terms of the practicality of enforcement, this relates to whether it is possible to detect a contravention and prove a breach of the condition's requirements. In terms of whether compliance is reasonable, in applying a condition it is necessary to consider whether the person carrying out the development can reasonably be expected to comply with it.

- v) precise - a condition must be worded so that it is precise in terms of being able to ensure that a condition is enforceable and also to ascertain what must be done to comply with it.
- vi) reasonable - a condition may be unreasonable even though it may be precisely worded and apparently within the powers available. It may be unreasonable because it is unduly restrictive or so onerous that as a matter of policy it should be avoided.

As set out above conditions should only be imposed on the grant of planning permission if they meet **all six** of the tests set out. Therefore, in applying a condition and similarly in assessing whether a condition should be removed, it is necessary to consider whether it passes all these tests. The guidance is very clearly set out in Circular 11/95 in that in applying a condition or assessing whether it should be removed authorities should ask themselves whether planning permission would have to be refused if that condition were not imposed. The argument that a condition will do no harm is no justification for its imposition; as a matter of policy a condition ought not to be imposed unless there is a definite need for it.

Paragraph 15 of Circular 11/95 states: ' The same principles, of course, must be applied in dealing with applications for the removal of a condition under section 73 or section 73A (of the Act): a condition should not be retained unless there are sound and clear-cut reasons for doing so.'

The following sections will look at condition 22 in detail and assess whether it is considered appropriate to remove the condition.

### **The Applicant's position.**

The applicant has stated that they believe the condition is unlawful and therefore should be removed. They have stated that they believe the condition is not necessary or reasonable and that it would struggle to be considered precise and enforceable, therefore not meeting the tests of a condition as set out in the National Planning Policy Framework and Circular 11/95. They also state that conditions imposed on the original planning permission ensure compliance with ETSU-R-97 derived noise limits in the interests of protecting the amenity of local residents.

Amplitude modulation is recognised within ETSU-R-97 'The Assessment and Rating of Noise from Wind Turbines' which is used throughout the UK to assess operational noise from wind turbines. However, the applicant acknowledges that the issue of EAM, a level of amplitude modulation of blade passing noise outside of the levels anticipated in ETSU, has been recognised as an isolated phenomenon.

They refer to the University of Salford commissioned research that has been noted above, highlighting that on the basis of the research the Government concluded that although EAM cannot be fully predicted, the incidence of EAM resulting from wind farms is low. There was therefore no compelling case for any further research and the Government continued to support the approach set out in the former PPS22. This approach is for local planning authorities to ensure that renewable energy developments have been located and designed in such a way to minimise increases in ambient noise levels through the use of the 1997 report by ETSU to assess and rate noise from wind energy developments.

The applicant highlights further research in terms of the AECOM report commissioned by DEFRA to examine the use of statutory nuisance when dealing with wind farm noise complaints (released in April 2011). The AECOM report notes that the various risk factors which might

give rise to EAM have been suggested, including linear layout of turbines, turbine spacing and high wind shear or a combination of these factors. The report concludes by stating that: *"despite research by numerous investigators over the last 20 years, there is to date no universally accepted explanation as to the causes of AM or means to predict its occurrence"*. It also states that whatever the actual number of occurrences of EAM, it only occurs at a minority of wind farm sites for some of the time.

The applicant states that there are isolated examples of Swinford, Chelveston and Denbrook where the EAM condition has been imposed, although these appear to be at odds with virtually every appeal decision since, including the Secretary of State's decisions at Woolley Hill, Wadlow, Barmoor, Sober Hill, Greenrigg/Ray and Crook Hill where no EAM condition has been imposed.

The issue of an EAM condition was considered by the Inspector within the Spaldington decision. In this decision the Inspector stated that:

*'Whilst both schemes would display some of the characteristics thought to be associated with EAM, the current situation can be summed as, there is no agreement over what the cause of the phenomenon is, there is no agreement over what the level of risk is in relation to any one particular wind farm and there is no agreement how to measure it. Here, the evidence does not suggest that these sites pose any greater risk of EAM so as to adopt an approach that differs from ETSU. Moreover, where such an approach has been taken, I am aware of the problems that have arisen in attempting to construct appropriate conditions'.*

The applicant concludes by assessing the condition in relation to the tests set out in Circular 11/95. The applicant states that in light of the evidence before us, given the small number of sites where EAM has been identified and the absence of any proven risk factors, it is statistically highly unlikely that EAM would be an issue at the proposed development. The imposition of a condition cannot therefore be justified as necessary or reasonable.

In addition to this in light of the fact that there is no consensus on a robust assessment methodology for detecting EAM, it is not currently possible to draft a condition which includes a robust and tested means of determining the presence of EAM which would meet the tests of precision and enforceability.

The applicant concludes their evidence by stating that "the inclusion of a condition on the basis that it will do no harm is not sufficient justification. It is not appropriate to apply the precautionary principle unless there is objective scientific evidence to demonstrate that there is a real risk of EAM occurring on the application site. Such evidence does not exist".

### **Formulating a recommendation.**

Officers have sought advice on this matter from independent noise consultants, Parsons Brinkerhoff (PB). PB has examined the application and recent appeal history where EAM has been discussed at public inquiries. They have advised as follows:

*The potential for EAM has been discussed in relation to wind farm applications since it was first highlighted in the Hayes McKenzie Report on low frequency noise for DTI, and the investigations surrounding the wind farm site at Deeping St. Nicholas.*



*The TNEI document no 78868 reports that an EAM condition has only been imposed on four wind farms and since then that one of them has had the condition removed. PB believes this to be an accurate reflection of the current situation, and further understand that an application to remove the condition at another of these sites (Den Brook) is coming shortly.*

*On the basis of the current evidence, and the above discussion, I would be of the opinion that it is not currently possible to construct a suitable condition for EAM that would meet the six tests of Circular 11/95, but hope that current research will lead to a solution in the future. Environmental Health Officers should be encouraged to take swift action to invoke their powers under the Statutory Nuisance regime if EAM should occur.*

When subsequently questioned about their original conclusion that there was a greater than average risk of EAM noise occurring at this site, the PB consultant responded:

*I did indeed state in my previous report that based on the understanding at the time (2010), that the site could be at a greater than average risk of EAM occurring. A lot of research has been undertaken since then to try to understand further the mechanisms that could give rise to EAM, the findings of which were presented at an IOA conference last year. There is also some research that has yet to be published (e.g. the Renewables UK study). It is now less clear that the factors that lead to my original conclusion are the exact causes for AM, and therefore I am not now able to reach the same conclusion based on the available evidence. That is not to say that it wont occur, merely that we cannot predict the likelihood of its occurrence on the available evidence.*

In order to arrive at a recommendation it is necessary to examine recent appeal decisions where EAM has been discussed by the Inspector, as such discussions are an important material consideration in relation to the application before Members today.

In addition to the cases highlighted above where an EAM condition has not been imposed by Inspectors, a more recent example at Batsworthy Cross, Devon in October 2012 is worth highlighting.

The Appeal Inspector discusses the subject at some length (sixteen paragraphs) some of which are as follows:

*I recognise that some people may be reluctant to complain about turbine noise affecting their home, because of fears that a history of complaints might depress the value of their property. Nevertheless, the available evidence suggests that wind farms, where OAM is known to occur, are uncommon; and that, even at those sites, the occurrence is intermittent. Despite laborious attempts to monitor OAM, confirmation of its occurrence through measurement is very rare. Several mechanisms have been suggested to explain its occurrence, but none have gained the general acceptance of professional acousticians working in the field.*

*There is some consensus that OAM is most likely to be noticed when background noise levels are low and wind shear is high but, again, this has not been firmly established. Certainly, there is no evidence to show that the appeal scheme is more likely to generate OAM than wind farms elsewhere. On that basis, and given the limited extent of known occurrences of this phenomenon, it could reasonably be argued that a condition to protect local residents against the potential effects of OAM is unnecessary. However, there is no doubt that those effects can have serious consequences and the absence of evidence to suggest that OAM would occur at Batsworthy Cross may simply reflect a lack of knowledge about the causative mechanisms.*

*Whilst it would be desirable to be able to control the occurrence of OAM by condition, it is not yet possible to reproduce the phenomenon under laboratory conditions; measure it; or, gauge the human response. There is no agreed dose response relationship or objective metric to describe it.*

*In the circumstances, the imposition of restrictions along the lines of those attached to planning permission for the Den Brook wind farm, would be unreasonable. Those conditions sought to limit the occurrence of AM in situations where changes in the measured LAeq, 125ms turbine noise level exceed 3dB. Whilst it may be possible to enforce such controls, there is nothing to show that this would reduce the harm caused by OAM.*

The following paragraph is considered by Officers to be particularly pertinent:

*I have strong reservations about controls which are reliant on a solution, (to control OAM,) being found in the foreseeable future. Following discussion at the inquiry, it seems inevitable that the wording of such a condition would carry so much uncertainty for the operator as to be unreasonable when judged against the tests of DoE Circular 11/95.*

And finally:

*In the circumstances described here, it would be unreasonable to attempt to control OAM through use of a condition and wrong to conclude that permission should therefore be refused. Whilst not an ideal solution, reliance on the statutory nuisance regime offers the best recourse available to local residents, should OAM be found to occur.*

A further similar discussion took place earlier in 2012 during an appeal at Wooley Hill for four turbines where the Inspector concluded:

*'none of these aspects, compounded by the lack of understanding on excess amplitude modulation, provide good reason for the imposition of a condition as a matter of routine or precaution. To my mind, on the basis of the evidence before me, the test of necessity has not been fully met'.*

The Inspector also states that the condition would be unreasonable, as there is no agreed methodology for measuring excess amplitude modulation, based on convincing research and therefore it would be unreasonable to impose a condition on such an uncertain basis.

The Inspector concludes the discussion on EAM by stating:

*'In conclusion, despite the findings of the Inspector in the Den Brook case, the evidence presented to me does not provide convincing justification that an excess amplitude modulation condition would be necessary. In addition, such a condition, if imposed, would be unreasonable given the current limited knowledge and understanding of excess amplitude modulation and a lack of consensus beyond the guidance of ETSU-R-97.'*

Clearly there is a current trend of appeal Inspectors having misgivings about relying on Statutory Noise Nuisance as being the most reliable route open to Local Authorities, but they consider that this is the best means currently available, and not through a planning condition.

In terms of condition 22 meeting the Circular 11/95 tests of a condition, the following is considered pertinent:

i) necessity – there has been no evidence provided to ascertain that EAM will occur at the site. It has been stated that there is foreseeable risk due to the wind shear element, layout, and height of the turbines. However, there is no agreement over what causes EAM and as the Inspector stated in the Cotton Farm decision such factors are also exhibited at other wind farms where EAM has not been identified. The same concern was expressed at Langford and both Inspectors ruled that there is no evident reason why the appeal sites should be particularly prone to EAM. The assertions were not supported by evidence and the same could be said for the site the subject of this application. It is therefore considered that in the absence of any real probability of EAM at the site, the condition to control it would not be justified in terms of necessity.

ii) relevant to planning – condition 22 would meet this test in terms of being relevant to a material planning issue.

iii) relevant to the development permitted – condition 22 would meet this test in terms of being relevant to the development permitted.

iv) enforceable – Concerns have been expressed by the applicant that there is no consensus on a robust assessment methodology for detecting EAM, and therefore it is not possible to draft a condition which includes a robust and tested means of determining the presence of EAM. This has been supported at appeal, with the appeal decisions referred to in this report all concluding that if the condition was imposed it would be unreasonable given the current limited knowledge and understanding of EAM.

The Inspector in the Langford appeal decision stated *'I also have doubts as to whether the condition would meet the Circular tests of enforceability and precision in that, despite what the Council's acoustic witness said about being able to identify EAM and distinguish it from other noise, this would appear to depend so heavily upon individual judgment as to render the approach unsafe'*. It is therefore considered that given the appeal decisions and the lack of agreement regarding a robust assessment methodology for detecting EAM that the proposed condition would not meet the test of enforceability as it is uncertain that the detection of EAM is possible and therefore there are issues over the practicality of enforcement.

v) precise –.The applicant argues that as there is currently no agreed robust assessment methodology for detecting EAM, the condition would not meet the test of precision as it would not be clear as to how to proceed in identifying EAM and measuring it. Given the recent appeal decisions and in particular that stated within the Langford appeal decision, it is considered that the condition would struggle to meet the tests of precision given the uncertainty over the methodology for identifying and measuring EAM and the subjectivity this introduces.

vi) unreasonable – the appeal decisions that have been discussed in this report clearly emphasise that an EAM condition would be unreasonable due to the uncertainty in methodology for measuring EAM and the lack of agreement over the causes of EAM and therefore the predictability of it occurring at any given site. Given the recent appeal decisions and the evidence presented within this application by the applicant it is considered that to continue to impose condition 22 would be unreasonable.

In light of the above assessment it is considered that condition 22 fails to meet four of the tests set out in Circular 11/95. It can also be seen that appeal Inspectors consider that Government

guidance does not go beyond that of ETSU-R-97 and that should EAM occur it can be dealt with outside of the planning system through the Statutory Nuisance route.

Notwithstanding the above however, the applicants have prepared a revised Environmental Management Plan which specifically refers to Amplitude Modulation in terms of reported complaints. This sets out the applicant's objective of investigating and taking appropriate action regarding complaints and incidents that occur related to the site in regards to noise of all types/characteristics including amplitude modulation. Condition 35 requires The Environmental Management plan to be agreed prior to commencement of development.

Whilst this would not provide a fully robust assurance that an EAM related problem would be solved should it emerge, the company are effectively committing to using best endeavours to do so and in so doing seeking to maintain their reputation as a responsible operator. Planning Officers consider this, in the context of the overall discussion above to be the best outcome achievable at this time.

The removal of Condition 22 only relates to Excess Amplitude Modulation and would not remove the more specific noise conditions which offer protection for residential properties in terms of general noise levels.

### **Summary of legal advice**

Further to the above a senior barrister was requested to advise on the validity of a condition to control EAM and his conclusions are summarised below:-

- Agrees with the conclusion in this report that condition 22 fails to meet four of the tests in circular 11/95 and that an appeal against refusal of this application by the Council would likely to be successful. The provisions of the Human Rights Act or localism agenda do not present a case for retaining the condition.
- That the condition previously suggested by Sadberge Parish Council including requirements for the turbines to temporarily cease operation would not meet the tests in the aforementioned Circular.
- Where a similar condition has been upheld in the Courts previously (Den Brook), this case was not considering whether the condition met the requirements of the Circular.
- If the EMP was drafted in similar terms to condition 22 it would suffer the same problems in terms of compliance with the Circular.
- Unable to offer an alternative condition likely to meet all the tests in the Circular and be supported by an Inspector.

### **Other matters**

A letter of objection was received on grounds of aviation safety, however whether the development is acceptable in principle on these grounds is not subject to consideration as part of this application. The condition requiring an appropriate mitigation scheme in the interests of aviation safety will remain in place regardless of the outcome of this application.

### **SECTION 17 OF THE CRIME AND DISORDER ACT 1998**

The contents of this report have been considered in the context of the requirements placed on the Council by Section 17 of the Crime and Disorder Act 1998, namely the duty on the Council to exercise its functions with due regard to the likely effect of the exercise of those functions on,

and the need to do all that it reasonably can to prevent crime and disorder in its area. It is not considered that the contents of this report have any such effect.

### **Conclusion**

Taking into account the findings of various planning appeal inspectors in recent wind farm cases and the advice of an independent acoustic consultant and senior barrister, it is considered that Condition 22 does not meet all the tests set out in Circular 11/95.

The inclusion of an EAM condition with the original permission took into account earlier technical advice and was considered to be reasonable by officers and Members at the time. However the legal and technical position has moved on with the acoustic consultant stating there is less certainty about the causes of EAM, and many Inspector appeal decisions rejecting the validity of the condition. Although a suitable condition cannot be identified the findings and advice clearly indicate that the issues with EAM would not have justified the refusal of planning permission.

It is important to emphasise that occurrences of EAM appear to be rare and may not be a feature at all at the Moorhouse site. Whilst not a perfect solution, the statutory nuisance regime is likely to be the most appropriate mechanism for dealing with a complaint about suspected EAM nuisance should it arise and accordingly it is recommended that the application to remove the condition should be approved.

### **RECOMMENDATION**

**That planning permission be granted with conditions attached as to planning permission 11/00160/FUL but without condition number 22 and the relevant accompanying technical note.**

### **Summary of reasons for approval**

**In keeping with planning permission 11/00160/FUL with the exception that the up to date national policy position, as reflected in the National Planning Policy Framework is referred to and the paragraph dealing with EAM noise be substituted with:-**

**“ it is considered that the inclusion of a specific condition on EAM would fail to meet certain tests of suitability for planning conditions as cited in Circular 11/95, namely necessity, reasonableness, precision and enforceability”.**